In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM — 1941.

No. 124

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL No. 122; PHIL L. VALLEY, JOHN ALEXANDER, and JACK HEISDORF, each individually, as business agent, organizer and vice-president, respectively, for and as representatives of all the members of Hotel & Restaurant Employees' International Alliance, Local No. 122;
INTERNATIONAL LAUNDRY WORKERS, LOCAL No. 174;
BARTENDERS INTERNATIONAL LEAGUE OF AMERICA, LOCAL No. 64, sometimes known as International Bartenders & Beverage Dispensers, Local No. 64;
INTERNATIONAL UNION OPERATING ENGINEERS, LOCAL No. 311;
MILWAUKEE BUILDING TRADES COUNCIL;
All affiliated with the American Federation of Labor,
Petitioners and Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD; HENRY C. FULDNER, individually and as Chairman of, L. E. GOODING, individually and as a member of, R. FLOYD GREEN, individually and as a member of the Wisconsin Employment Relations Board;
PLANKINTON HOUSE COMPANY, a corporation,
Respondents and Appellees.

BRIEF OF PLANKINTON HOUSE COMPANY, Respondent, In Opposition to Petition for Writ of Certiorari.

HERMAN M. KNOELLER
Attorney for
Plankinton House Company,
Respondent.

Page

INDEX AND SYNOPSIS

Nature of Action 1- 2

Statement of Jurisdictional Grounds 2- 3

Corrected Statement of Facts 3- 4

Summary of Argument 4

Argument 4-50

I. The true record is replete with acts of violence and continuing manifestations of force, fear and unfair advertising on the part of the petitioners 4-26

A. The real purpose of the Wisconsin Employment Peace Act 4- 6

B. The real record of violent means adopted 6-13

C. The real object of the unlawful concerted activities 13-16

D. The continuity of the force, fear and intimidation 16-18

E. The Unions' authorization and ratification of unlawful conduct 18-23

F. The real issues of the labor dispute 23-26

II. There is no substantial federal question involved ... 26-30

III. The Wisconsin Employment Peace Act and especially Sec. 111.06 (2) (e) thereof is a valid exercise of the State's police powers 30-50

A. Analysis of the Wisconsin Employment Peace Act 30-32

B. State's power over manifestations of force in labor matters 32-35

Page

C. The majority-minority classification is an accepted reasonable form of legislative classification in labor matters 35-43

D. The qualified right of free speech is neither involved nor invaded 43-50

Conclusion 50

CITATION OF AUTHORITIES
CASES

Aikens v. Wisconsin, 195 U.S. 194 32

A. F. of L. v. Bain, 106 Pac. (2d) 544 42

A. F. of L. v. Swing, 312 U. S. ..., 61 Sup. Ct. 568 ..... 3, 23, 26, 33

Amer. Furn. Co. v. I. B. of T. C., 222 Wis. 338, 268 N. W. 250 46

Amer. Steel Foundries v. Tri-City Central Trades Council, et al., 257 U. S. 184, 42 Sup. Ct. 72, 66 L. Ed. 189 22

Bacon v. Martin, 305 U. S. 380 30

Baumann v. West Allis, 187 Wis. 566, 204 N. W. 907 14

Burbank v. Ernst, 232 U. S. 162 28

Cantwell, et al., v. Connecticut, 310 U. S. 296 ..... 34, 44

Carlson v. California, 310 U. S. 106 ..... 3, 17, 25, 44, 45

Connolly v. Union Sewer Pipe Co., 184 U. S. 540 42

Consolidated Turnpike Co. v. Norfolk etc., R. Co., 228 U. S. 596 28

Erie R. Co. v. Tompkins, 304 U. S. 64 29

Fox Film Corp. v. Muller, 296 U. S. 207 28

Page

Gitlow v. New York, 268 U. S. 652 44

Gompers v. Buck's Stove & Range Co., 221 U. S. 418.. 44

Grayson v. Harris, 267 U. S. 352 28

Hague, et al., v. Committee for Industrial Organization, et al., 307 U. S. 496 44

Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229.. 44

Hotel & Restaurant Employees' International Alliance Local No. 122, et al., v. Wisconsin Employment Relations Board, et al., 236 Wis. 329, 294 N. W. 632, 295 N. W. 634 1

Lauf, et al., v. Shinner & Co., Inc., 303 U. S. 323....29, 33, 46

Liberty Warehouse Co. v. Burley, 276 U. S. 71..... 30

Lovell v. City of Griffin, 303 U. S. 444 43

McGoldrick v. Compagne Generale Transatlantique, 309 U. S. 430 27

Milk Wagon Drivers Union of Chicago, Local No. 753, et al. v. Meadowmoor Dairies, Inc., 312 U. S. ..., 61 Sup. Ct. 552 .....3, 22, 23, 26, 28, 30, 34, 48, 49

Minersville School District, et al., v. Gobitis, 310 U. S. 586 .....34, 44

Minnesota v. Probate Court, 309 U. S. 270 29

Nann v. Raimist, 255 N. Y. 307, 174 N. E. 690, 73 A. L. R. 669 49

New York ex rel. Doyle v. Atwell, 261 U. S. 590 28

Richardson Company v. Scott, 276 U. S. 128 28

Page

Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U. S. 453 39

Schenck v. United States, 249 U. S. 47 44

Schneider v. State, 308 U. S. 147 44

Schultz v. Frankfort, etc., Ins. Co., 151 Wis. 537, 139 N. W. 386 22

Senn v. Tile Layers Protective Union, 222 Wis. 383, 268 N. W. 270, 268 N. W. 875 46

Senn v. Tile Layers Protective Union, 301 U. S. 468, 57 Sup. Ct. 857, 81 L. Ed. 1229 ..... 29, 30, 33, 46

Stone v. Interstate Exchange, 200 Wis. 585, 229 N. W. 26 14

Thornhill v. Alabama, 310 U. S. 88.3; 17, 25, 33, 43, 44, 45, 46

United States v. Hastings, 296 U. S. 188 28

Voeller v. Nielston Warehouse Co., 312 U. S. ..., 61 Sup. Ct. 376 30

Wis. Labor Relations Bd. v. Fred Rueping Leather Co., 228 Wis. 473, 279 N. W. 673 46

STATUTES

Wisconsin Statutes:

Sec.:

103.53 33

103.54 18

111.01 4

111.02 (8) 23

111.04 ..... 5, 25

Page

111.06 (1) 5

111.06 (1) (a) 25

111.06 (1) (c) 14, 23, 25

111.06 (1) (d) 15

111.06 (1) (e) 15

111.06 (1) (f) 15

111.06 (2) (a) 7

111.06 (2) (e) 23, 25, 27, 30, 31, 32, 36, 37, 45, 46, 50

111.06 (2) (f) 7, 10

111.06 (2) (g) 12

111.06 (2) (h) 11

111.06 (2) (j) 7

111.07 (1) 5, 32, 37, 42, 43, 49

111.07 (4) 5

111.15 ..... 6, 31, 36, 42, 43

111.18 43

343.681 32

343.683 32

United States Statutes:

28 U. S. C. A. 344 (b) 2

CONSTITUTION

United States:

Tenth Amendment 31

Page

PUBLICATIONS AND TEXTS

Austin, John, on Jurisprudence:
5th Ed. Lecture 6 36

Holmes, Mr. Justice O. W., on The Common Law:
p. 214 36

Restatement of Law on Agency:
Vol. 1, Sec. 93, 94, p. 230-238 18

Story, Mr. Justice Joseph, On the Constitution:
Vol. 2, Sec. 1580, p. 634 43

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM — 1941.

No. 124

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL No. 122, et al.,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, PLANKINTON HOUSE COMPANY, et al.,

Respondents.

BRIEF OF PLANKINTON HOUSE COMPANY, Respondent,

In Opposition to Petition for Writ of Certiorari.

NATURE OF ACTION

This is a proceeding before the above entitled court upon a petition of the above named trade unions and certain individuals acting personally and in a representative capacity as the officers and members of the aforesaid unions for a Writ of Certiorari to review a decision of the Supreme Court of Wisconsin (236 Wis. 329; 294 N. W. 632) rendered November 8, 1940, and after motion for rehearing was denied January 7, 1941 (236 Wis. 329; 295 N. W. 634). Said

State Supreme Court's decision affirmed the judgment of the Circuit Court of Milwaukee County, Wisconsin, rendered May 14, 1940, sustaining, confirming and enforcing an order made by the Wisconsin Employment Relations Board on February 15, 1940. Based upon the complaint filed November 20, 1939, by the Plankinton House Company (hereinafter called "the employer") charging the petitioners herein (hereinafter called "the unions involved") with violence, mass picketing and other unfair labor practices under the Wisconsin Employment Peace Act (Ch. 111 Wis. Stats. 1939), a full hearing commencing on December 1, 1939, was had before the Wisconsin Employment Relations Board (hereinafter called "the Board") which filed its Findings of Fact and Conclusions of Law determining the petitioners herein guilty of violence and other unfair labor practices. The Board issued its order directing that the petitioners herein take certain affirmative action by way of posting notices, etc. in order to effectuate the policy of the Act and that they immediately cease and desist from:

(a) Engaging in, promoting or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;

(b) Attempting to hinder or prevent by threats, intimidation, force, or coercion of any kind, the pursuit of lawful work by employees of the Plankinton House Company;

(c) Boycotting in any way the Plankinton House Company.

STATEMENT OF JURISDICTIONAL GROUNDS

The case is brought to this court on the ground that it involves a justiciable controversy under Sec. 237 (b) of the Act of Congress dated February 13, 1925 (28 U.S.C.A. 344 (b)) providing, inter alia, that this court has jurisdiction to review by certiorari the final judgment of the highest

court of any state determining the validity of a state statute allegedly repugnant to any provision of the United States Constitution. The position of the respondent, the Plankinton House Company, in this respect is:

(1) That there is no substantial federal question involved;

(2) The assumed federal question is frivolous and devoid of merit because it rests on obviously false assumptions not appearing in the record, namely, merely peaceful picketing and "peaceful persuasion disentangled from violence and free from picketing en masse or otherwise conducted so as to occasion imminent and aggravating danger" (*American Federation of Labor v. Swing*, 312 U. S. ...., 61 Sup. Ct. 568; *Thornhill v. Alabama*, 310 U. S. 88; *Carlson v. California*, 310 U. S. 106);

(3) The assumed federal question is further frivolous and devoid of merit because it is contrary to the established law settled by this court in the case of *Milk Wagon Drivers Union of Chicago, Local 753, et al., v. Meadowmoor Dairies, Inc.*, (1941) 312 U. S. ...., 61 Sup. Ct. 552, 85 L. Ed. (Adv. Op.) 497);

(4) Even if a federal question does exist there is also in the record an alternative independent non-federal question decided by the Wisconsin Supreme Court which is in itself broad enough to sustain the State Court's judgment and warrant the denial of a Writ of Certiorari.

CORRECTED STATEMENT OF FACTS

In limine, we wish to challenge the accuracy of the "Summary of Matter Involved" set forth in the Petition for Writ of Certiorari (p. 2-6) and incorporated by refer-

ence in the Unions' brief. Errors of omission and commission exist especially in respect to the Unions' acts of past violence and other unfair labor practices and the continuing fear and intimidation resulting therefrom. For the sake of brevity and to avoid repetition we do not here enumerate the errors but give them special treatment in this brief under the heading of "ARGUMENT," which immediately follows.

ARGUMENT

Summary of Argument

I—The true record is replete with acts of violence and continuing manifestations of force, fear and unfair advertising on the part of the petitioners.

II—There is no substantial federal question involved.

III—The Wisconsin Employment Peace Act and especially Sec. 111.06 (2) (e) thereof is a valid exercise of the State's police powers.

I.

The True Record Is Replete With Acts of Violence and Continuing Manifestations of Force, Fear and Unfair Advertising On the Part of the Petitioners.

A. The Real Purpose of the Wisconsin Employment Peace Act.

The purpose of the Wisconsin Employment Peace Act was not as stated on p. 2 of the Petition. The purpose of the Act and the public policy of the State in respect thereto is plainly and unmistakably set forth in Sec. 111.01 of the Act.

It is therein stated that there are three major interests involved in every strike, namely, the public, the employee and the employer; that industrial peace, regular and adequate income for the employe and uninterrupted production of goods and services are promotive of all these interests which are dependent upon peaceful adjustment of whatever controversy may arise; that the primary rights of third parties should not be invaded; that negotiations of terms and conditions of work should result from voluntary agreement between employer and employees; that standards of fair conduct in employment relations should be established, thereby limiting individuals and group rights of aggression and defense in respect to which the State substitutes processes of justice for the more primitive methods of trial by combat.

Other distinguishing features of the Act are:

(1) It is neither penal nor criminal in its nature and provides for neither fines nor imprisonment for the commission of unfair labor practices enumerated therein (Sec. 111.07 (4) Wis. Stats.).

(2) It makes no provision by way of reparation or restitution to the employer or employee for the civil wrongs suffered by the commission of unfair labor practices but relegates the parties to their remedies at law and equity to be obtained in a separate civil proceedings (Sec. 111.07 (1) Wis. Stats.).

(3) It not only recognizes the right of employees to organize (Sec. 111.04 Wis. Stats.) but forbids interference therewith (Sec. 111.06 (1) Wis. Stats.).

(4) It cautiously provides that nothing therein shall be construed so as to invade unlawfully the right to free

speech, or to interfere with or impede or diminish in any way the right to strike or the right of individuals to work (Sec. 111.15 Wis. Stats.).

The purpose of the Act was not to repudiate or pervert the basic principles of the National Labor Relations Act and the 1937 Wisconsin Labor Relations Act or to destroy the equalization of employer-employee bargaining power as alleged on p. 2 of the Petition. As stated by the Wisconsin Supreme Court in its opinion (Sup. R. 62 and 63), the purpose of the Act was to prevent the commission of unfair labor practices not only by employers but also by employees and thereby attain industrial peace, regular and adequate income for employees and the uninterrupted production of goods and services.

B. The Real Record of Violent Means Adopted.

The inability of the parties to agree upon proposed changes in a new labor contract was not as stated on p. 3 of the Petition but was the result of the Unions' arbitrary action in canceling negotiation proceedings, demanding arbitration as provided by the labor contract and then refusing to abide by the arbitration award and repudiating its labor contract by calling a strike, indulging in violence and mass picketing and disseminating under the guise of freedom of speech, false publicity and untruthful advertising that the employer was unfair to organized labor, as disclosed by Findings of Fact Numbered 10 to 27, inclusive, and Conclusions of Law Numbered 1 to 4, inclusive, of the Board (R. 254-260) which were in all respects sustained by the Milwaukee Circuit Court (R. 47-50) and confirmed by the Wisconsin Supreme Court in its original opinion (Sup. R.

50, 57, 58, 63), and in its final opinion denying the motion for rehearing (Sup. R. 70, 71).

The acts of violence and other unfair labor practices of the petitioner were not merely a few simple assaults or fugitive encounters as alleged on p. 4 of the Petition, but were studied and concerted manifestations of force, fear, violence and unfair advertising committed by high ranking officers of the Union, picket captains and supervisors of the picket lines, not once but several times, and at a time (November 17, 1939) which was less than two weeks prior to the commencement of the hearing on December 1, 1939, before the Wisconsin Labor Relations Board. Contrary to the allegations contained on pp. 4 and 5 of the Petition, the employer's complaint before the Wisconsin Employment Relations Board charged and the record proved, without contradiction, that in violation of Sec. 111.06 (2) (a) and Sec. 111.06 (2) (f) Wis. Stats. prohibiting coercion and intimidation of an employee in the enjoyment of his legal rights and the security in his person and property, and in violation of Sec. 111.06 (2) (j) Wis. Stats. prohibiting the commission of crimes, the unions, their officers and their members committed the following unlawful acts upon the following persons:

(1) Paul Ziebell, an employed bellboy, was on November 7, 1939, assaulted and battered while standing in the hotel by James O'Brien, a union member and picket, who was carrying a picket sign and left the picket line and entered the hotel to strike Mr. Ziebell in the face with his clenched fists and commit the crime and misdemeanor (R. 132-138, S. R. 19, 20).

(2) Lester Raasch, an employed bellboy, on November 5, 1939, was threatened by the same James O'Brien with physical violence (R. 135-138) and on November 6, 1939, while holding the hotel

doors open for guests, was spit upon by the same James O'Brien while performing picket duty (R. 136) and on November 17, 1939, while unloading an automobile of a guest of the hotel, was struck three or four blows in the face with the clenched fist of Charles McLaughlin, assistant business agent and assistant secretary of Hotel Employees' Union, Local 122, and supervisor of pickets (R. 136-138, 96, 97, 87, S. R. 19, 20).

(3) Harvey Weber, purchasing agent, was on November 4, 1939, assaulted, battered, and threatened by Phil L. Valley, business manager of Local No. 122 (R. 138-140) and on November 13, 1939, was abused and intimidated by the above mentioned Charles McLaughlin (R. 140, S. R. 19, 20).

(4) James Myrick, an employed busboy, was on November 5, 1939, threatened and called vile names by the above mentioned Charles McLaughlin (R. 141, 142) and on November 6, 1939, was spit in the face by James O'Brien who was performing picket duty at the hotel (R. 141, 142, S. R. 19, 20).

(5) Thomas James, an employed laundry man, on November 17, 1939, while leaving the hotel for the hospital to see his sick wife, was attacked by Larry C. McAllen, a picket captain (placed there by the chairman of the union's picket committee) (R. 96-97) and was violently thrown to the sidewalk, rendered helpless when his arms were pinned under the picket's knees, and was struck several severe blows in the face with the clenched fists of the picket before rescued by the police. The injuries sustained were serious and necessitated X-rays and medical treatment (R. 143, 144, 97, S. R. 19, 20).

(6) Edward Knopf, an employed bellboy, was on November 14, 1939, kicked in the knees several times by Thomas O'Mahar, a picket and a former

employee of the Plankinton House, who left the picket line to assault Mr. Knopf on the public highway (R. 144, 145, S. R. 19, 20).

(7) Elmer Hundt, supervisor of the Plankinton House parking lot, was on November 9, 1939, called a vile and abusive name by the above mentioned Thomas O'Mahar who was performing picket duty and in the presence of the union supervisor who did not reprimand him (R. 146, 147, S. R. 19, 20).

(8) Fred Langdon, an employed crippled valet at the Plankinton House, was on November 11, 1939, slugged with the clenched fists of two men, purporting to act for the Union, at a tavern nearby (R. 148, 149).

(9) Rudolph Stano, an employed bellboy, on November 17, 1939, while loading a guest's car at the hotel, was struck several blows in the face by Joseph Hofich, captain of the pickets at the Plankinton House and who still supervises the picket line (R. 149, 150, 89, 90, 97, S. R. 19, 20).

(10) Ward Whitney, an employed busboy, was on November 18, 1939, assaulted and battered at the entrance of the Plankinton House by a picket who left the picket line and delivered four or five blows with his clenched fist and later that same day was again attacked in the public street by two persons purporting to act for the Union and again was struck several blows with the clenched fists of his assailants (R. 150-153).

(11) Robert Jeske, assistant purchasing agent, on November 10, 1939, was struck several severe blows in the face with the clenched fist of Charles Alden, a union picket and former doorman at the hotel, when Jeske sought to make a delivery of ice (R. 111, 112, S. R. 21).

(12) H. O. Wood, general manager of the Plankinton House, was spit upon by one of the pickets; some of the pickets carried sticks and clubs in their

hands as they paraded in front of the hotel entrances; they booed, hissed and sneered at hotel guests all day and night; during the course of their boisterous conduct parading in front of the hotel entrances they ate peanuts and constantly threw the shells or shucks thereof in the doorways of the hotel; on the arrival of a taxicab they yelled and hooted and directed the prospective guests to other hotels (R. 158, 162).

(13) William Komes, the head waiter at the Plankinton House, on November 4, 1939, while holding the delivery doors of the hotel open for a floral decoration delivery, was threatened and called vile names by pickets (R. 100-102).

(14) Peggy Hehmeyer, the head waitress at the Plankinton House, on November 4, 1939, while assisting Mr. Komes in holding the delivery door open was threatened with physical violence by fifteen or twenty pickets menacingly parading before her (R. 104).

(15) John W. Polcyn, Captain of the Milwaukee Police Department, testified to seven distinct arrests and convictions of the pickets at the property of the Plankinton House Company because of violence, crimes, and misdemeanors (R. 194-197, S. R. 32). As an expert in maintaining peace and order, he would not state that the instances of disorderly conduct or disturbances were small in view of the circumstances (R. 198).

The Board's findings numbered 20, 21, 23, 24, 25 (R. 258, 259), and amended 26 (R. 271) and amended Conclusion of Law numbered 4 (R. 271, 272) are in conformity with the record above cited.

Furthermore, the employer's complaint before the Wisconsin Employment Relations Board charged and the record discloses that in violation of Sec. 111.06 (2) (f), Wis. Stats., prohibiting the hindrance by mass picketing, threats, intim-

idation, force and coercion of the pursuit of lawful work and the obstruction of the entrance to and the egress from the place of employment and interference with the free and uninterrupted use of public roads and the deliveries of materials to and from the employer's business, and in violation of Sec. 111.06 (2) (h), Wis. Stats., prohibiting the taking of unauthorized possession of the employer's property, the Unions did commit the following acts on the dates hereinafter mentioned:

(1) On November 4, 1939, a delivery of floral decorations was prevented by the Unions who indulged in mass picketing and their Vice-President and assistant business agent, Jack Heisdorf, and their assistant business agent and Secretary, Charles McLaughlin, assaulted the delivery man and the pickets destroyed the floral decorations (R. 100-104, S. R. 19, 20).

(2) On November 5, 1939, a delivery of clean wash from the Plankinton House to the Kilbourn Hotel was prevented by a flying squadron of mass pickets who threatened violence and intimidated the employees (R. 138, 139).

(3) On November 4, 1939, a delivery of sample cases by guests of the hotel was prevented by mass picketing and by Phil L. Valley, union business manager, who threatened violence and assaulted and battered Harvey Weber, an employee (R. 139, 140).

(4) On November 13, 1939, a delivery of waste paper from the hotel to a dealer was prevented by the above named Charles McLaughlin and a large group of pickets who threatened violence to the truck driver and used vile and indecent terms toward Harvey Weber, an employee (R. 139, 140, 141-143, S. R. 19, 20).

(5) On November [illegible], 1939, an attempt to deliver ice cubes to the hotel was prevented by mass picket-

ing, assault, and battery of employees, and the cans of ice were tipped and the ice cubes dumped into the gutter of the street by the pickets and officers of the Unions (R. 104, 105, 111-113, 124-126).

(6) About two weeks before December 11, 1939, shingle nails were spread about the parking lots on several occasions on each day near where ten pickets were standing. The police officer himself assisted in picking up the same (R. 146, 147).

(7) On November 19, 1939, a liquid stench bomb was spread along thirty feet of the carpet on the third floor of the hotel near the dining rooms and near student classrooms of the Business Institute (R. 156, 157, 122).

(8) On November 26, 1939, the rear elevator landing window on the main floor of the Plankinton House was broken by a large stone (R. 157, Exhibits 22, 23).

(9) Ever since November 2, 1939, the pickets have gathered at the hotel at different times in large numbers, jeering and spitting upon the clothing of employees and guests of the hotel, booing, hissing and sneering at the guests and employees in a very boisterous manner, eating peanuts and throwing the shells in the hotel entrance doors. Some of the pickets carry sticks and clubs; in the evening when the guests are about to retire, the pickets yell and hoot at the arrival of every taxicab (R. 158).

Findings of Fact numbered 19 and 22 (R. 257, 258, S. R. 8-18) and amended Conclusion of Law numbered 4 (R. 271) of the Board are in conformity with the undisputed record above cited.

Furthermore, the complaint charged and the record also discloses that in violation of Sec. 111.06 (2) (g), Wis. Stats., the Unions engaged in a secondary boycott, to-wit:

(1) On or about November 8, 1939, the Unions intimidated and coerced Marquette University by threatening the discharge of several hundred college students from other hotels and restaurants in the City and County of Milwaukee unless the University forced the students working at the Plankinton House to cease work and go out on strike; it was a distinct threat and was to be carried out unless the University yielded (R. 114-119).

(2) On or about November 8, 1939, the Unions intimidated and coerced the Milwaukee School of Engineering by threatening the discharge of several hundred students then working at other hotels and union shops in the City and County of Milwaukee unless the Milwaukee School of Engineering forced their students working at the Plankinton House to cease work and go out on strike (R. 119-121, S. R. 21).

(3) On or about November 13, 1939, one of the attorneys for the Unions urged the Business Institute of Milwaukee, a tenant of the Plankinton House Company at the Plankinton House, to break its valid existing lease without cause or justification, and upon refusal, the employees and customers of the Business Institute were insulted, hissed and booed at by the pickets. A stench bomb was thereafter found on the third floor of the hotel near the classrooms of the Business Institute, as a result of which students were nauseated and forced to go home (R. 121-124).

The Board's Finding numbered 17 (R. 257) and amended Conclusion of Law numbered 4 (R. 271) are in conformity with the undisputed record and the testimony of the Unions' own witnesses corroborates the charge.

C. The Real Object of the Unlawful Concerted Activities.

An examination of the record also discloses that not only

the above unlawful means were adopted by the Unions, but that the unlawful object of the Unions' concerted action was to force the employer to commit unfair labor practices contrary to the declared public labor policy of the State of Wisconsin and in direct violation of the following positive legislative enactments of said State:

(1) Sec. 111.06 (1) (c) Wis. Stats., prohibiting the employer from entering into an all-union or closed shop agreement unless three-fourths or more of the employees shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the Board. The award of the arbitration board (Exhibit 9, R. 84) expressly provided for a compliance with this statute and the law would impute the provisions of this statute to every labor contract whether written therein or not (*Stone v. Interstate Exchange*, 200 Wis. 585, 589, 229 N. W. 26; *Baumann v. West Allis*, 187 Wis. 506, 525, 204 N. W. 907). In the case at bar no vote whatsoever was taken, much less a three-fourths vote by secret ballot under the direction of the Board as required by the above statute. The Unions emphatically refused to take a vote on this question (R. 226). Every demand made by the Unions to change the terms and conditions contained in the 1938 labor contract was granted by the arbitrators with but one exception and that was in respect to the all-union or closed shop issue. Despite all this, the employer accepted the arbitration award (Exhibit 10, R. 84). So the only dispute remaining between the parties was over the closed shop provision or all-union contract which the Unions sought to enforce upon the employer without the required statutory vote as found by the Board in its memorandum decision (R. 266) and proven by the admissions of the parties themselves (R. 168; R. 191). Thus, it was said there was only one issue, and that was "a clear cut dispute

on the issue of a closed shop under the terms of the arbitration award" (R. 205, S. R. 34).

(2) Sec. 111.06 (1) (e), Wis Stats., prohibiting an employer from bargaining collectively with the representative of less than a majority of his employees would also be violated by the employer if the Unions succeeded in their unlawful concerted action. As a matter of law the employer could not recognize as the exclusive bargaining agency for all his employees the minority represented by the Unions herein; and if he refused to bargain collectively with the representative of a majority of his employees he would also violate Sec. 111.06 (1) (d) Wis. Stats. and be guilty of unfair labor practices. The overwhelming vote of the Plankinton House Company employees by secret ballot in the election held by the Wisconsin Employment Relations Board on February 29, 1940, distinctly showed that 130 out 134 employees voting favored their own independent union as their exclusive bargaining representative (S. R. 39, 40). Certainly the employer is bound by virtue of Sec. 111.06 (1) (f), Wis. Stats., to the terms of the collective bargaining agreement (Exhibit 31, S. R. 25) duly executed with the Independent Organization of the Plankinton House Company Employees which was duly certified by the Wisconsin Employment Relations Board on March 6, 1940 (S. R. 39, 40) as the exclusive representative for collective bargaining purposes.

The basis, therefore, for the issuance of the Labor Board's order was not merely the failure on the part of the Union to obtain a majority vote before going on strike as alleged on p. 5 of the Petition, but also embraced the violence and other unfair labor practices on the part of the Unions, their officers and their members who were sued in a representative capacity. The Findings of the Board numbered 15 to 27 (R. 256-259), together with the amended Finding numbered 26

(R. 271), refer to the action of the Unions and indicate that the individuals performed their unlawful acts as *officers and members of the Unions involved*. It is significant to note that the lawbreakers, Phil L. Valley, business manager, Jack Heisdorf, Vice-President, Charles McLaughlin, assistant Secretary, James O'Brien (a picket stationed by the Unions on the picket line), Joseph Hofich, captain of the pickets, and Larry McAllen, a union picket, were never employees of the Plankinton House Company, but, as the Findings indicate, acted throughout the strike *as officers and agents of the Unions*. The Board's Conclusion of Law numbered 4 (R. 260) and amended Conclusion of Law numbered 4 (R. 271, 272) specifically find the above named parties and others guilty of unfair labor practices "*arising out of the controversy between respondent unions and the complainant, Plankinton House Company.*" Also, the Order of the Board to cease and desist from attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employees of the Plankinton House Company is expressly directed against the *appellant Unions*, their officers, members, agents, successors, and assigns (R. 260, 261).

D. The Continuity of the Force, Fear and Intimidation.

The record further discloses the existence and the continuity of the fear and intimidation generated by the past acts of violence and other unfair labor practices of the Unions involved. This Court's attention is called to the affidavits of H. O. Wood, general manager of the Plankinton House and the Kilbourn Hotel, which affidavits are attached to the Attorney General's motion for appropriate temporary relief, a restraining order, and in opposition to a statutory

stay of enforcement of the Board's Final Order and the Circuit Court's Decree (S. R. 6-18). The affidavits clearly show that the Unions still continue to indulge in unfair labor practices, picket the hotel entrances, intimidate employees and prospective hotel guests with abusive language, indulge in mass picketing, and interfere with deliveries at the hotels. The need for immediate preventive relief was not only apparent but imperative. The Board recognized this fact when it issued its Cease and Desist Order which was based upon its Findings of Fact numbered 27 which states: "Throughout the strike, the City of Milwaukee caused to be station at the Plankinton House throughout the twenty-four hours each day, six police officers for the purpose of maintaining order" (R. 259).

The Milwaukee Circuit Court on its review of the Findings of Fact, Conclusions of Law and the Order of the Labor Board recognized the background of violence that characterized the entire campaign of the Unions and the continuing fear and intimidation generated by those acts of violence and other unfair labor practices. Thus it stated in its decision (R. 20, 21):

> "The Board was justified in concluding that the violent methods, assaults or disturbances which were pursued or which ensued from the outset and from time to time thereafter, were ample to characterize the whole campaign or to warrant a reasonable inference that the attitude of the picketers was continuously threatening or that threatening conduct would be resorted to should conditions be favorable for the purpose. In this connection, constant presence of officers of the law and the nature of the conduct employed were sufficient to warrant the Board's Findings and Conclusions."

The trial court distinguished the *Thornhill* and *Carlson* cases upon the very fact that in the case at bar there existed

"violence, coercion, intimidation and threats" as found by the Board upon sufficient evidence (R. 44).

Likewise, the Wisconsin Supreme Court emphasized throughout its original opinion the violent conduct of the Unions (S. R. 50, 56 58, 63). In its second opinion denying the motion for rehearing, the Court squarely placed its decision upon the record of violence in the case (S. R. 70-71) and expressly stated (R. 71):

> "The appellant employees, unions and officers are not in a position in this case to raise any question respecting the right peacefully to picket or the right of free speech. The picketing carried on in this case was not peaceful * * *."

E. The Unions' Authorization and Ratification of Unlawful Conduct.

A question is raised in the Petition with respect to the responsibility of the Unions for the unfair labor practices charged in the complaint, proved in the record and found by the Board and the Courts. It is elementary that the affirmance of an act by an agent may be established by any conduct of the purported principal manifesting that he consents to be a party to the transaction or by conduct justifiable only if there is a ratification, and that the affirmance of an unauthorized transaction may be inferred from a failure to repudiate it (*Restatement of the Law on Agency*, Vol. 1, Sec. 93, 94, p. 230-238). No authority need be cited for the rule that a principal is liable for the acts of his agent done within the scope of his authority and with an eye for his master's business. Sec. 103.54 Wis. Stats., expressly provides that an officer or member of an association and the association participating or interested in a labor dispute may be held

responsible or liable in any civil action at law or suit in equity or in any criminal prosecution for the unlawful acts of individual officers, members, or agents upon proof of a preponderance of the evidence of:

(1) The doing of such acts by persons who are officers, members, or agents of any such association, and

(2) Actual participation in or actual authorization of such acts or ratification of such acts after actual knowledge thereof by such association.

In the case at bar authorization and ratification were proved by the testimony of the Union Officers themselves, to-wit:

(1) Alfonso Gamby, President of Local 122 and Chairman of the Executive Committee, testified that John Alexander kept a daily record of the men who were placed on the picket line and was appointed captain of the strike committee by Phil. L. Valley, business agent, with the Executive Board's approval; that when men were placed on the picket line they were given cards and later paid off for picket duty; James O'Brien was so paid off for picket duty (R. 218).

(2) Phil L. Valley, business agent, has supervisory control over the Union officers in their territory and sees to it that they keep their territory "clean"; he was authorized to call the strike and had full power to appoint a captain to handle the pickets (R. 83); he called the strike (R. 84) and ordered 75 to 80 men to form a picket line about the hotel (R. 85). He was present at the time the florist truck pulled up to make a delivery of floral decorations to the Plankinton House on November 4, 1939, when John Heisdorf (Union Vice-President) and Charles A. McLaughlin (Assistant Business Agent and Secretary of the Union)

assaulted and battered the delivery man; he knew of the arrest of John Heisdorf and Charles McLaughlin therefor. The Unions provided bail and legal counsel; a day or two thereafter Mr. Heisdorf was returned to the picket line (R. 85-87). The Unions also provided bail and legal counsel and paid the criminal fine for Mr. McLaughlin by reason of his arrest and subsequent conviction. Immediately thereafter the Unions returned Mr. McLaughlin to the picket line. He was again arrested for extreme violence on November 17, 1939, and again his bail and legal counsel were provided by the Unions; and upon conviction, his fine paid by the Unions (R. 87). Mr. Valley knew about Mr. James O'Brien, a former Union member and prize fighter, who was arrested for assault and battery on the picket lines at the Plankinton House on November 17, 1939 (R. 88). Mr. Valley knew about Thomas J. O'Mahar, a member of the Union doing picket duty, who was arrested and convicted on November 14, 1939, for striking and kicking Edward Knopf, a bellboy at the Plankinton House. The Union again provided bail and legal counsel for Mr. O'Mahar and paid his fine and returned him to the picket lines where he still is (R. 89). Joseph Hofich is known to Mr. Valley as a member of the Union and captain of the pickets at the Plankinton House. Mr. Hofich was arrested by the police on November 19, 1939, for striking Rudolph Stano, an employed bellboy, several blows in the face with his clenched fist; Mr. Valley received the report on this assault and battery and the Union provided bail and legal counsel for Mr. Hofich (R. 89, 90). Later Mr. Hofich was found guilty and fined for this offense (R. 196). Thereafter, Mr. Hofich was returned to the picket line *as supervisor of pickets* (R. 97).

(3) John Alexander testified that he was Chairman of the strike committee, had complete charge of all the pickets,

instructed them how to behave, and appointed picket captains. He placed Charles A. McLaughlin and John Heisdorf on the picket line. He instructed Thomas O'Mahar and Larry McAllen how to act on the picket line. He appointed Joseph Hofich captain of the pickets. After checking the record of James O'Brien with the Union records and his performance in the picket line, he paid Mr. O'Brien for performing picket duty (R. 95-99, S. R. 19, 20). The record discloses that James O'Brien as a picket not only assaulted and battered Paul Ziebell, an employed bellboy, on November 7, 1939 (R. 132-138, S. R. 19, 20), but on November 5, 1939, threatened Lester Raasch, an employed bellboy, with physical violence (R. 135-138) and on November 6, 1939, spit upon Lester Raasch while he was holding the hotel doors open for guests (R. 136).

All the individuals above mentioned, outside of Alfonso Gamby, John Alexander and Phil L. Valley (who was found guilty of unfair labor practices by the Board's Finding of Fact numbered 21 (R. 258)), were arrested and found guilty of acts of violence and breaches of the peace committed on the picket line. Some of them had been arrested several times and were still on the picket line performing official duties as supervisors, captains or pickets. Practically all of the parties found guilty of violence were not strangers who forced their way into the picket line but were and still are recognized as members of the Unions in good standing, retaining their supervisory power and high Union offices (R. 97). Some of them have been found guilty of not only one so-called isolated violation or fugitive encounter but several distinct offenses and nevertheless returned to the picket line after bail, legal counsel and even criminal fines were provided by the Unions. In the face of that record, can anyone help but conclude that the Unions participated in the unlawful acts of their leading officers and members?

The untimely resolutions, if any, of the Union Executive Board (R. 218) later reprimanding these law violators are simply self-serving oral declarations—never reduced to writing for inspection and verification. Needless to say the effect of these so-called resolutions was never very stimulating but, in fact, was destroyed by the Unions' permitting the self-same lawbreakers to return to the picket line as supervisors and captains after their criminal convictions. The self-professed Union apostle of peace, John Alexander, despite his national experience in Union activities from New York to San Francisco, supervised the pickets in the conduct of a sitdown strike at the Milwaukee Athletic Club in 1937 (R. 227, 228, S. R. 35, 36). He was the former President and business manager of the C. I. O. Hotel Employees' Union which he admitted was controlled by Communists: "Out of twelve members of the Executive Board of the C. I. O., nine were members of the Communist Party and it was under Communists' domination" (R. 225, S. R. 35). It might well be said that the action and conduct of the Unions, their officers and members, speak more convincingly than their words of mouth. Neither the Court nor the injured third parties are bound by the Unions' mere declaration but may seek and find the true purpose of their concerted action (Schultz v. Frankfort, etc., Ins. Co., 151 Wis. 537, 546, 139 N. W. 386). As stated by this Court in a labor controversy in *American Steel Foundries v. Tri-City Central Trades Council, et al.* (1921), 257 U. S. 184, 42 Sup. Ct. 72, 66 L. Ed. 189:

> "When one or more assaults or disturbances ensue they characterize the whole campaign which became effective because of its intimidating character in spite of the admonitions given by the leaders to their followers as to lawful methods to be pursued, however sincere."

The observation of Mr. Justice Frankfurter in the recent case of *Milk Wagon Drivers Union, et al. v. Meadowmoor*

Dairies, Inc., 312 U. S. ....., 61 Sup. Ct. 552 at 536, is very pertinent, to-wit:

> "It is true of a union as of an employer that it may be responsible for acts which it has not expressly authorized or which might not be attributable to it on strict application of the rules of respondeat superior."

F. The Real Issues of the Labor Dispute.

It is suggested in footnote numbered 1 on p. 6 of the Petition that the right of the Unions, the individual workers or even strangers to picket peacefully was denied in the case at bar because of the absence of an employer-employee relationship or a labor dispute as defined by Sec. 111.02 (8) Wis. Stats. This is not the fact; there never was a question of "stranger picketing" or the necessity of an employer-employee relationship before peaceful picketing may be conducted as decided by this court in the case of *A. F. of L. v. Swing*, 312 U. S. ....., 61 Sup. Ct. 568. The only issue in the case, prior to calling the strike, was, as heretofore stated, the right of the Unions to a closed shop without first obtaining a three-fourths vote by secret ballot as required by the statute (Sec. 111.06 (1) (c) Wis. Stats. (R. 84) and the award of the Arbitration Board (Exhibit 9, R. 266). After the strike was called the real issue was the right of the State of Wisconsin in the exercise of her sovereign powers over all manifestations of force within her borders, to regulate *concerted* picketing and *concerted* boycotting by powerful labor combinations found guilty of violence, intimidation and other unfair labor practices, including (Sec. 111.06 (2) (e)), Wis. Stats., the failure to obtain a majority vote of the workers by a secret ballot before engaging in the above overt concomitants of a general strike.

The assumption by the petitioners on p. 19 of their Petition and throughout their Brief, that they are the representatives of the minority of the employees in the exercise of their right to picket peacefully, has no basis in the record. The petitioners do not belong to that class. Prior to the calling of the strike they did not even take a statutory vote to determine the wishes of either the majority or the minority of the workers (R. 82). How then, can they claim to represent or champion the cause of the minority? The overwhelming vote of the Plankinton House Company employees by secret ballot in the election held under the supervision of the Wisconsin Employment Relations Board on February 29, 1940, distinctly showed that 130 out of 134 employees voting favored their own independent union as their exclusive bargaining representative (S. R. 39-40). The independent organization of the Plankinton House Company employees was duly certified by the Board on March 6, 1940, as the exclusive representative for collective bargaining purposes (S. R. 39-40) and now has a valid labor contract with the employer. Therefore, the Unions involved cannot claim to represent the majority. Whom do they represent? Is the basic tenet of all labor legislation — the right of the working man to determine by his own free will whether he will join or not join a particular labor organization — to be preserved? May a powerful combination of labor by concerted coercive activities, including realistic picketing enmeshed with extreme violence and destructive boycott directed at a business force the employer, in order to escape financial ruin, to interfere with his employees in the exercise of their free choice of self-organization by coercing them to join the union against their wishes? Shall the employees' legal right of self-organization succumb to the Unions' practical economic power to rule or ruin both the employer and his employees? The answer to

the above questions are self-evident in a government granting equal justice to all under the law and seeking national unity and security through industrial peace.

In conclusion, therefore, it may well be said the petitioners herein are inaccurate in their statement of facts and the issues involved. They have ignored the true facts and the real issues in the case and have substituted therefor foreign facts, feigned issues and false assumptions dehors the record. Upon the undisputed evidence it cannot be said that the Unions engaged in mere peaceful picketing as defined in the *Thornhill* and *Carlson* cases. They were not concerned with publicizing the true facts of the labor dispute, for, if they were, they would be forced to state that they destroyed industrial peace in Milwaukee by cancelling negotiation proceedings, demanding arbitration and then rejecting the arbitrartors' award, and calling a strike for the purpose of forcing the employer to:

(1) Grant them a closed shop contrary to law (Sec. 111.06 (1) (c) Wis. Stats. and without taking any vote therefor.

(2) Bargain collectively with the representative of less than a majority of his employees contrary to law (Sec. 111.06 (1) (e) Wis. Stats.) when another had been duly certified by the Board as the exclusive representative of his employees and had a valid collective bargaining contract with the employer.

(3) Interfere with and coerce his employees in their legal rights including the right to self-organization and to join or not join any union contrary to law (Sec. 111.06 (1) (a), Sec. 111.04 Wis. Stats.) so as to give the petitioners exclusive collective bargaining rights and a closed shop.

The Unions were not content with free competition and true communication of thoughts in the open market of ideas.

They were not satisfied with an appeal to reason in order to inform and persuade the public and the working employees to lend their support to Labor. (Cf. *A. F. of L. v. Swing*, 312 U. S. ...., 61 Sup. Ct. 568). On the contrary, they sought to coerce by resorting to concerted acts of extreme violence and realistic picketing enmeshed with a destructive primary and secondary boycott resulting in continuing fear and intimidation of the suppliers of merchandise, the working employees and the business customers of the Plankinton House Company. Under these circumstances the language of this Honorable Court in the *Meadowmoor case*, (312 U. S. ...., 61 Sup. Ct. 552 at 555), is strikingly pertinent to the facts in the case at bar, to-wit:

> "The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. So the Supreme Court of Illinois found. We cannot say that such a finding so contradicted experience as to warrant our rejection. Nor can we say that it was written into the Fourteenth Amendment that a state through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct.
>
> "These acts of violence are neither episodic nor isolated. Judges need not be so innocent of the actualities of such an industrial conflict as this record discloses as to find in the Constitution a denial of the right of Illinois to conclude that the use of force on such a scale was not the conduct of a few irresponsible outsiders. The Fourteenth Amendment still leaves the state ample discretion in dealing with manifestations of force in the settlement of industrial conflicts."

II.

There Is No Substantial Federal Question Involved.

In view of the explicit language contained in the final opinion of the State Supreme Court denying the motion for

rehearing and confirming the order of the Board and the judgment of the Milwaukee Circuit Court enjoining all picketing and boycotting because of the past violence and continuing fear and intimidation, there is really no necessity, as the State Supreme Court said (S. R. 71), "to distinguish between what a majority group may do in carrying on a strike from what the minority group may do." The Court further stated (S. R. 71):

> "We pointed out that the statute nowhere prohibited employees from withdrawing from their employment either singly or in groups and certainly it in no way interferes with the right of free speech. Sec. 111.06 (2) (e) as construed does not prohibit, as described in the *Thornhill case*, peaceful picketing. * * *"
>
> "The appellant employees, unions and officers are not in a position in this case to raise any question respecting the right peacefully to picket or the right of free speech. The picketing carried on in this case was not peaceful and the right of free speech is in no way infringed by the statute or the order of the Board."

The State Supreme Court had previously stated in its original opinion (S. R. 63):

> "The acts committed by the petitioners as shown by the findings in this case would have justified injunctive relief under the common law or any labor relations statute, either state or federal."

By reason of the aforesaid Findings of Fact and Conclusions of Law this Honorable Court may in its sound discretion and without proceeding further refuse to consider the constitutionality of the Wisconsin Employment Peace Act and especially Sec. 111.06 (2) (e) thereof on the ground that it is unnecessary for a decision on the merits of the case (Cf. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U. S. 430, 60 Sup. Ct. 670).

There is, therefore, no substantial federal question involved warranting the issuance of a Writ of Certiorari because:

(1) The federal reviewable character of a decision of the highest State court and what is drawn in question and decided is ascertained from its last and final judgment or opinion — not from any dictum or what was contained in its first or earlier opinion (*Grayson v. Harris*, 267 U. S. 352, *Burbank v. Ernst*, 232 U. S. 162); the Writ of Certiorari must be dismissed where the State court decision rested on non-federal grounds, notwithstanding the unnecessary discussion of any constitutional question (*Richardson Company v. Scott*, 276 U. S. 128).

(2) It is a settled rule that where the record shows, although there is a federal question in the case, there is also an alternative independent non-federal question decided by the State court which is in itself broad enough to sustain the judgment, the State court decision is not reviewable. (*Consolidated Turnpike Co. v. Norfolk etc., R. Co.*, 228 U. S. 596; *New York ex rel. Doyle v. Atwell*, 261 U. S. 390; *United States v. Hastings*, 296 U. S. 188; *Fox Film Corporation v. Muller*, 296 U. S. 207).

(3) The Findings of Fact of a State court in respect to violence and continuing intimidation in a labor dispute are conclusive in the federal court. As stated by this Court in the *Meadowmoor Case*, (312 U. S. ...., 61 Sup. Ct. 552 at 555 and 557):

> "It is not for us to make an independent valuation of the testimony before the master. We have not only his findings but his findings authenticated by the state of Illinois speaking through her supreme court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the

constitutional guarantee here invoked. The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our judgment for that of the state court is to transcend the limits of our authority. And to do so in the name of the Fourteenth Amendment in a matter peculiarly touching the local policy of a state regarding violence tends to discredit the great immunities of the Bill of Rights. * * * Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted. * * * Since the Union did not urge that the coercive effect had disappeared either before us or, apparently, before the state court, that question is not now here."

(4) The judgment of the highest State court is conclusive as to the construction and application of a state labor statute (*Senn v. Tile Layers Protective Union*, 301 U. S. 468; *Lauf, et al. v. E. G. Shinner & Co., Inc.*, 303 U. S. 323.) When an attack was made upon the constitutionality of a state statute as construed by the language of the Minnesota Supreme Court in *Minnesota v. Probate Court*, 309 U. S. 270 at 273, it was said:

> "This construction is binding upon us. Any contention that the construction is contrary to the terms of the Act is unavailing here. *For the purpose of deciding the constitutional questions appellant raises we must take the statute as though it read precisely as the highest court of the State has interpreted it.*" (Italics ours.)

(5) The United States Supreme Court is bound by the common law of the state for it has no common law of its own. As stated by Mr. Justice Brandeis, in the case of *Erie R. Co. v. Tompkins*, 304 U. S. 64 at 78:

> "And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law."

(6) A federal question is frivolous and devoid of merit where it rests on an obviously false assumption (as in the case at bar where merely peaceful picketing is postulated), or where it is contrary to the established law settled by the United States Supreme Court (as held by the decision of this Court in the case of Meadowmoor Dairies, Inc., supra), or where it is obviously only a state question (the labor policy of the State of Wisconsin as interpreted by this Court in the *Senn case*, supra, Cf. *Bacon v. Martin*, 305 U. S. 380).

(7) Only those who have been injured as a result of a denial of constitutional rights can invoke the jurisdiction of this Court on constitutional questions (*Voeller v. Nielston Warehouse Co.*, 312 U. S. ...., 61 Sup. Ct. 376; *Liberty Warehouse Co. v. Burley*, 276 U. S. 71); the petitioners herein do not represent the minority, have not picketed peacefully but their utterances were, in paraphrasing the language of this Court in the *Meadowmoor case* (312 U. S. ...., 61 S. Ct. 552 at 555),

> "in a context of violence that lost their significance as an appeal to reason and became part of an instrument of force. Such utterances were not meant to be sheltered by the Constitution."

III.

The Wisconsin Employment Peace Act and Especially Sec. 111.06 (2) (e) Thereof Is a Valid Exercise of the State's Police Powers.

A. Analysis of Wisconsin Employment Peace Act.

If this Honorable Court still wishes to consider the constitutionality of Sec. 111.06 (2) (e) Wis. Stats. despite

the proven violence in the record and the failure of a substantial federal question, it is believed that statute can be sustained as a valid exercise of the sovereign police powers of the State of Wisconsin under the Tenth Amendment to the United States Constitution relating to the reserved powers of the states. This of course, requires a fair analysis devoid of a "fire to pervert" and recognition of the principle that a state statute should not be declared unconstitutional unless it clearly appears to be so beyond a reasonable doubt.

In testing the constitutionality of the Wisconsin Employment Peace Act and especially Sec. 111.06 (2) (e) thereof "on its face," we must consider the entire Act in order to ascertain the true legislative intent. We must observe that Sec. 111.06 (2) (e) thereof specifically refers to concerted or cooperative action of a group, for it provides that it shall be an unfair labor practice for an employee—

> "*to cooperate* in engaging or promoting or inducing picketing, boycotting or other overt concomitants of a strike unless a majority of any collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike." (Italics ours.)

As the State Supreme Court noted in its opinion (S. R. 56), Subsection (e) of the Act—

> "by its terms does not apply to an individual; an individual cannot cooperate with himself. Subsection (e) does not forbid an employee to quit his employment individually or in concert with others."

The Legislature further provided by Sec. 111.15 Wis. Stats. that the Act shall not be construed to impede the right to strike and the right of individuals to work or to invade unlawfully the right of free speech. Even if an employee is found guilty of an unfair labor practice because of failing

to comply with Sec. 111.06 (2) (c), he loses only the benefits granted employees under the Act but still retains all his rights under the Constitution, the statutory law and the common law, as provided by Sec. 111.07 (1) Wis. Stats., as construed by the State Supreme Court (S. R. 58, 59). These legislative mandates were carefully observed by the State Supreme Court in its opinion construing Sec. 111.06 (2) (c), (S. R. 55, 56).

B. State's Power Over Manifestations of Force in Labor Matters.

That the State of Wisconsin has the right to control all manifestations of force, fraud and fear whether practiced by physical means or otherwise within its borders, and to regulate the use of the coercive weapons of industrial strife —the lock-out, the strike, picketing, boycotting and other overt concomitants of a strike—by powerful combinations of either capital or labor acting in concert is now firmly established by decisions of the highest state and federal courts. In the exercise of this police power Wisconsin has declared it criminal to concert together for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession, by any means whatsoever (Sec. 343.681 Wis. Stats.), or by threats, intimidation, force or coercion of any kind to hinder any other person from engaging in any lawful work (Sec. 343.683 Wis. Stats.). These statutes have been held to be constitutional and to apply particularly to malicious mischief of combinations subject to legislative repression as declared by this Honorable Court speaking through Mr. Justice Holmes in *Aikens v. Wisconsin*, 195 U. S. 194.

In addition to the aforesaid criminal enactments, Wisconsin has provided a Labor Code which declares what con-

stitutes lawful conduct in labor disputes (Sec. 103.53 Wis. Stats.) The Code permits peaceful picketing but it specifically conditions this conduct upon the absence of intimidation, coercion, fraud, violence, breach of the peace or threat thereof, and expressly states that nothing therein shall be construed to legalize a secondary boycott. This Wisconsin Labor Code was held to be constitutional and a valid exercise of the State's police powers in *Senn v. Tile Layers Protective Union*, 301 U. S. 468, where peaceful picketing in Wisconsin was fully defined by the great liberal jurist, Mr. Justice Brandeis who concluded (p. 481):

> "The laws of Wisconsin as declared by its highest court, permit unions to endeavor to induce an employer when unionizing his shop to agree to refrain from working in his business with his own hands. * * * Whether it was wise for the State to permit the Unions to do so is a question of public policy—not our concern. The Fourteenth Amendment does not prohibit it."

Again in the case of *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323, the aforesaid Wisconsin Labor Code, especially Sec. 103.53 thereof, was carefully examined and found binding upon the federal courts.

The more recent pronouncements of this Honorable Court summarize and crystallize the power of the State in matters of labor relations. Thus, it is stated in *Thornhill v. Alabama*, 310 U. S. 88 at 103:

> "The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern."

In *A. F. of L. v. Swing*, 312 U. S. ...., 61 Sup. Ct. 568 at 570, we find this significant language:

> "That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic."

After admonishing judges not to be so innocent of the actualities of industrial conflict and recognizing that the Judiciary has no power to formulate state policy or pass upon the wisdom of state labor codes, this Court properly observed in the recent *Meadowmoor Dairies* case, 312 U. S. 61 Sup. Ct. 552 at 556:

> "We are here concerned with power and not with the wisdom of its exercise."

If the State of Wisconsin has the power to enact valid criminal and civil laws relating to Labor Relations as shown above, then it must also have the power to enact the Wisconsin Employment Peace Act to provide for unfair labor practices covering both employers and employees. It must also have the power to prevent the defeat of its labor policy seeking industrial peace, regular and adequate income for employees and uninterrupted production of goods and services. To deny the State appropriate means to attain the object of its power is in effect to deny the existence of its power. Thus, in *Cantwell, et al., v. Connecticut*, 310 U. S. 296 at 307 and 308, this Court stated the declaration of a state's policy as distinguished from a mere common law concept would weigh heavily in any challenge of the law as infringing constitutional limitations and that:

> "No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious."

Likewise, in the case of *Minersville School District, et al. v. Gobitis*, 310 U. S. 586, it was held that the local Board of

Education in Pennsylvania and the legislature of that state could constitutionally require children to take the oath of allegiance to the flag and give the flag salute without infringing upon the due process of law or invading the right of religious freedom and liberty guaranteed by the Fourteenth Amendment. It was stated by Mr. Justice Frankfurter in delivering the opinion of the Court (p. 595, 600):

> "*National unity is the basis of national security.* To deny the legislature the right to select appropriate means for its attainment presents a totally different order of problem from that of the propriety of subordinating the possible ugliness of littered streets to the free expression of opinion through distribution of handbills. * * * Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. *But to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties.*" (Italics ours.)

Only by a strict adherence to the rule of segregation of powers can the independency of the Judiciary itself be preserved in our democratic form of government.

C. The Majority-Minority Classification is an Accepted Reasonable Form of Legislative Classification in Labor Matters.

The petitioners argue at length in their Petition and Brief (pp. 24-28) that the majority-minority classification provided by Sec. 111.06 (2) (e) Wis. Stats. is arbitrary, unreasonable, indefinite and harsh in its operation. Political economy teaches us that the right aim of legislation is the carrying out of the principle of utility, or, in other words, the proper end of every law is the promotion of the greatest happiness for the greatest number. We know from the science of jurisprudence that a right is nothing more than

a permission to exercise certain material powers and upon certain conditions to obtain protection, restitution or compensation by the aid of public force (Cf. Mr. Justice Holmes, The Common Law, p. 214; John Austin, Jurisprudence, 5th Ed. Lecture 6).

Now the "public force" that is behind the law under question is the force of the mandate of the Legislature of the State of Wisconsin as contained in Sec. 111.06 (2) (e) Wis. Stats. The Legislature, not the workers by majority vote, has definitely determined what constitutes unfair labor practices as a matter of law in the State of Wisconsin; the workers are merely required to meet fixed legislative standards for the safety of themselves, the employer and the public generally. National unity and security in the uninterrupted production of goods and services, the stabilization of employment, the adequacy of workers' income and the peaceful adjustment of labor controversies are thereby secured. The workers ascertain by secret ballot the question of fact, namely, *whether the dispute with the employer is so substantial and meritorious as to warrant a general strike.* They do not determine whether any worker may strike or work. They do not determine whether any worker may peacefully picket or otherwise truthfully publicize the facts of a labor controversy. When such fact of substantiality or lack of substantiality in a labor controversy has been ascertained, fixed legislative standards have been met and the law is self-executing in determining what *concerted and coercive instrumentalities of industrial strife* may or may not be used in both an authorized and an unauthorized strike. Sec. 111.06 (2) (e) Wis. Stats. as construed by the Wisconsin Supreme Court, aided by explicit statutory provisions (Sec. 111.15 Wis. Stats.) prohibiting any construction that interferes with the right to strike or the right to free speech, applies only to an unauthorized strike. The attempted use

of *concerted picketing and boycotting* in an *unauthorized* strike is determined to be merely an unfair labor practice — not a crime resulting in the imposition of fines or imprisonment and not even a civil wrong entitled to legal damages by way of reparation. Although one may be found guilty of an unfair labor practice by reason of the provisions of Sec. 111.06 (2) (e) Wis. Stats., he still retains all his rights under the Constitution, the common law and other state statutes, for it is recognized by Sec. 111.07 (1) Wis. Stats. that nothing in the Wisconsin Employment Peace Act shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction. This is fully explained in the State Supreme Court's original opinion (S. R. 56-61).

Sec. 111.06 (2) (e) Wis. Stats. is a mere application of the Majority Rule which is fundamental in the attempt of the Legislature and of Congress to regulate labor relations. It is the principle upon which the National Labor Relations Act and the Railway Labor Peace Act and the Wisconsin Employment Peace Act is based. It is the principle whereby the most important affairs of life, including the administration of justice, are determined in the legislative, judicial and executive departments of our democratic form of government. It is the familiar principle upon which the equitable maxim "Equality is Equity" is based. In a labor election held for any purpose the vote of each worker represents an equity. The majority vote represents the majority of the equities. The "group interest" of all the workers is prior and paramount to the "individual interest" of a single worker who by force of his association with his fellow-workers subjects and subordinates his personal selfish interest. If a single worker does not agree with the majority, his right to strike, continue work, peacefully assemble with other members of the minority, protest, reason, speak freely and publish truthfully the facts of the labor dispute is not

even regulated, much less prohibited, by the Wisconsin Employment Peace Act and especially Sec. 111.06 (2) (e) thereof. So the Act reads and so the State Supreme Court decided (S. R. 55, 56, 58, 64).

Trade unions themselves govern both their internal affairs with their members and their external relations with the employer and the public by the Majority Rule. Labor's philosophy advocating the all-union or closed shop clearly recognizes and in fact is based on this rule. Was Labor ever heard to demand a unanimous vote of the workers before obtaining a closed shop in any plant? Was Labor ever heard to complain that a majority vote of the workers for a closed shop was insufficient, denied equal protection of the law and resulted in an arbitrary, unreasonable and discriminatory classification of legislative subjects (Petitioners' Brief, p. 25)? Has Labor ever demanded unanimity of vote for the election of union officers? Or, to fine, suspend or expel a recalcitrant member? Or, to call a strike, picket and boycott any particular industry or its non-union employer? Certainly not. The group interest of the majority determining the substantiality and the merit of these questions prevailed against the wishes of any dissenting member or opposing minority. Again we ask, why may not the Legislature adopt similar procedure in the exercise of its police powers relating to labor relations that affect the public interest and the national unity and security so profoundly?

The difficulties petitioners conjecture that workers will have under the statute to obtain the necessary majority vote by secret ballot are more imaginary than real. The hypothetical cases they cite in their Brief (p. 25) are doubtful and extreme. These dialectics like generalizations are always invidious. For example, what constitutes mass picketing? Why should two or three pickets at a single narrow en-

trance of a small retail store constitute mass picketing and, therefore, unlawful conduct in one case, and twenty or thirty pickets distributed before several wide entrances of a large manufacturing plant not constitute mass picketing and, therefore, lawful conduct in another case. The answer is that each case must be decided on its own facts and circumstances. Application of the law to a particular case must be left to the "trier of fact" if there is room for conflicting inferences. With good reason this Honorable Court in the case of *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, observed:

> "Whatever terminology is used, the criterion is necessarily one of degree and must so be defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided for by the great concepts of the Constitution, such as 'interstate commerce,' 'due process,' 'equal protection.' In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion. There is, thus, no point in the instant case in a demand for the drawing of a mathematical line and what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases."

In the Petitioners' Brief (pp. 27 and 28), the alleged right to use concerted picketing, boycotting and other overt concomitants of an unauthorized strike whenever and wherever petitioners see fit and however destructive to employers, working employees and the public, is claimed comparable to the right of a citizen in the exercise of free speech to protest the results of a public election. The petitioners would apply the Majority Rule in creating collective bargaining units and also in electing exclusive bargaining representatives. Here, however, they stop. According to their argument any member of a collective bargaining unit should

be allowed, in the exercise of free speech, not only to express freely his own opinion and protest the decision of the majority, but also to reject with or without cause all the labor matters negotiated by the duly elected exclusive bargaining representative and accepted by the majority of his fellow workers. Furthermore, he should be allowed the use of destructive instrumentalities of concerted economic force in conjunction with powerful nation-wide labor combinations *in order to coerce the members of the majority who voted contrary to his wishes* to change their vote. He should be permitted thereby to threaten them with the loss of their jobs by destroying their employer's business. He should be permitted to deprive them of the right of self-organization by denying finality to their vote on all important labor matters. If threats and intimidation fail, usually violence and breaches of the peace ensue, as in the case at bar. All this is done theoretically in the name of free speech, but practically with an eye to defeat others in the exercise of their rights to self-organization and collective bargaining.

Only economic chaos can follow from the above labor philosophy of Discord and Destruction. It cannot be the law in any civilized community which hopes to exist during the present turbulent times as a government of laws rather than a government of men. In comparing the right to seek the change of an employee's vote on a labor question with the right of citizens in a public election to change the votes of other citizens on political questions, the petitioners overlook the undeniable fact that the votes of citizens on political questions may not lawfully be changed by threatening them with the loss of their means of livelihood, their right to self-organization, liberty, property and freedom from force, fear and fraud. This does not mean that the rights to freedom of speech, of the press and of assemblage are allowed to the majority alone and denied to the minority because they are

in the minority. On the contrary, these rights were expressly preserved for *both the majority and the minority* by the Wisconsin Employment Peace Act as construed by the State Supreme Court in its original opinion (S. R. 55, 56, 58 and 64) and in its final opinion denying the motion for rehearing (S. R. 71). Just as the petitioners now so vehemently protest against the mandates of the Wisconsin Legislature as construed by the State Supreme Court, so also may they protest to the people of the State of Wisconsin and their legislative representatives against the wisdom or the lack of wisdom of the particular labor statute under attack or any other statute. Certainly, the courtroom is not the arena for debating issues of legislative policy.

It is either adult sophistry or sophomoric immaturity to claim as petitioners do in their Brief (pp. 25 and 26) that there exists no clear danger of substantive evils in concerted picketing, boycotting and other overt concomitants of an unauthorized strike, especially during these times of national defense armament. Now, if ever, the sovereign police powers of the state making for stabilization of employment, adequacy of income, uninterrupted production of goods and services and peaceful adjustment of labor controversies, are of paramount importance. Now, if ever, we must have national unity and national security. Strikes like wars are never profitable, but extremely wasteful, economically, politically and socially. Destruction of workers' jobs by impulsive and shortsighted labor leaders calling strikes contrary to the wishes of the workers themselves is suicidal in this economic world. If the workers themselves may combine under the state and federal law to organize and select collective bargaining units and exclusive bargaining representatives by a majority vote, then why may they not likewise ascertain the question of fact pertaining to that matter particularly within their personal knowledge, namely,

whether the wages, hours, working conditions or any other substantial item of labor controversy, is such in their particular employment as to warrant the calling of a general strike? Do not the majority labor under the same working conditions as the minority? Do they not share the gains and suffer the losses involved in labor matters together as a unit?

The Oregon case of *A. F. of L. v. Bain*, 106 Pac. (2d) 544, cited in Petitioners' Brief (pp. 26-27) is easily distinguishable for it involved *a penal statute* directed against *individual* action, including the exercise of free speech in *any and every form of peaceful picketing.* (See Wisconsin Supreme Court's analysis of this case in S. R. 56, 57). The Oregon statute was devoid of any protective provisions as contained in Sec. 111.15 Wis. Stats. preventing the invasion of free speech and in Sec. 111.07 (1) Wis. Stats., preserving for an ex-employee participating in an unauthorized strike his rights under the Constitution, the statutory law and the common law. Furthermore, the Oregon statute was not narrowly drawn to cover the precise situation giving rise to the danger incidental to the use of certain coercive instrumentalities of an industrial strife conducted by *concerted action of labor combinations.* This is indicated in the split opinion of the Oregon Supreme Court when the majority said:

> "We are far from implying by our decision that proper regulatory measures may not be taken by the state to curb evils arising from activities of labor unions, as of every other group. No right is held absolute—not even the right to speak freely."

The case of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, cited in Petitioners' Brief (p. 28), is not pertinent at all to the case at bar. It involved the Sherman Anti-Trust

Act and an Illinois anti-trust statute containing *penal provisions* and *no separability clauses*. The Wisconsin Employment Peace Act does not contain any penal provisions imposing criminal fines or imprisonment for its violation. Furthermore, it contains a separability clause (Sec. 111.18 Wis. Stats.). It does not unreasonably discriminate between majority and minority groups but expressly preserves to the minority the right to strike and free speech as contained in Sec. 111.15 Wis. Stats. and the right to all legal and equitable relief in courts of competent jurisdiction as contained in Sec. 111.07 (1) Wis. Stats.

D. The Qualified Right of Free Speech is Neither Involved nor Invaded.

Petitioners claim in their Brief (pp. 18, 36) that in the exercise of their coercive activities as labor combinations, they may use certain instrumentalities of economic force and industrial strife (concerted picketing, boycotting and other overt acts concomitant of a general strike) whenever and wherever they see fit and however destructive to the employer, working employees and the general public under the guise of free speech and the State of Wisconsin is powerless to control them. This is an abuse of the right of free speech. History and Law have always looked upon this right as a *Shield against Oppression and not a Sword of Aggression* (Cf. *Lovell v. Griffin*, 303 U. S. 444, 451, *Thornhill v. Alabama*, 310 U. S. 88, 101, 102). Reasonably limited, this freedom is a "*privilege*" in a free government but without such limitation it might become the "*scourge of the republic*" (Justice Joseph Story, *On The Constitution*, Volume 2, Sec. 1580, p. 634).

It is a fundamental principle, long established, that freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right beyond the reasonable control of the State and the Federal Government (*Gitlow v. New York*, 268 U. S. 652). As Mr. Justice Holmes stated in *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. 247 at 249:

> "The most stringent protection of free speech * * * does not even protect a man from an injunction against uttering words that may have all the effect of force."

Under such circumstances speech becomes what has been called "a verbal act" and is as much subject to injunction as the use of any other force whereby property is unlawfully damaged (*Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418). It is a cardinal error to affirm that the right of free speech is so absolute that it may be exercised under any circumstances and without qualifications; like other rights that exist in a civilized society it must always be exercised with reasonable regard for the conflicting rights of others (*Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229). The same is true in regard to the exercise of the constitutional right of religious freedom (*Cantwell v. Connecticut*, 310 U. S. 296; *Minersville School District, et al., v. Gobitis*, 310 U. S. 586) and free press and assemblage (*Schneider v. State*, 308 U. S. 147, *Hague, et al., v. C. I. O.*, 307 U. S. 496).

The petitioners cite throughout their Brief passages from this Court's decision in the *Thornhill v. Alabama* (310 U. S. 88) and the *Carlson v. California* (310 U. S. 106) cases in support of their alleged legal conduct in picketing. They ignore the record of violence in the case at bar. They overlook the facts and the nature of the statutory provisions under review in both the *Thornhill* and the *Carlson* cases. Neither the Milwaukee Circuit Court (R. 43-44) nor the

Wisconsin Supreme Court (S. R. 55, 56, 70-71) denied the imperative legal effect of these cases, but fully discussed and clearly distinguished them on the basis of the factual situation appearing in the record and the nature of the Wisconsin Employment Peace Act under review. They pointed out that unlike the Wisconsin Statute in the case at bar, the enactments in the *Thornhill* and the *Carlson* cases contained criminal terms and penal clauses providing for fines and imprisonment and were so applied by the state courts as to prohibit even an individual from peacefully publicizing *in any manner whatsoever* the true facts of a labor dispute. They pointed out that the individuals in the above cases were found not guilty of any threats, intimidation, coercion, violence or breach of the peace for, "all words spoken were uttered in a peaceful and orderly manner without putting any one in fear." They observed implicitly the caveat of this Honorable Court stated in both the above cases, to-wit:

> "The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives and the property of its residents cannot be doubted."

Lastly, in full recognition of this Court's decision in the above cases, the Wisconsin Supreme Court stated explicitly in its original opinion (S. R. 56) and again in its final opinion (S. R. 71) that Sec. 111.06 (2) (e) of the Wisconsin Act does not prohibit peaceful picketing as described in the *Thornhill* case. Where, therefore is the basis for the petitioners' claim (pp. 35 and 36 of Brief) that all picketing, including the free communication by any means whatsoever, was prohibited by the Wisconsin Employment Peace Act as construed by the State Supreme Court?

It is a strain upon our credulity to hear petitioners and their attorneys, who have engaged in labor activities for

many years, confess at this late date that they do not know what constitutes peaceful picketing under the Wisconsin law (p. 36 of Brief). It is amusing to note the facility with which they define this term when they argue the rights of labor in other cases. The alleged "vague contours" of the term "picketing" as used in the Wisconsin Statutes and decisions did not confuse them in the least when they argued for those rights in the cases of *American Furniture Co. v. I. B. of T. C.* (1936), 222 Wis. 338, 268 N. W. 250; *Senn v. Tile Layers Protective Union* (1936), 222 Wis. 383, 268 N. W. 270, 268 N. W. 875; *Wisconsin Labor Relations Board v. Fred Ruepping Leather Co.* (1938), 228 Wis. 473, 279 N. W. 673. If more authoritative legal determinations of what constitutes peaceful picketing in Wisconsin are needed, the petitioners well knew they could be found in decisions of this Court construing and applying Wisconsin labor legislation in the cases of *Senn v. Tile Layers Protective Union*, 301 U. S. 468, and *Lauf v. E. G. Shinner & Co., Inc.*, 303 U. S. 323. The Milwaukee Circuit Court in its decision found (R. 45):

> "All of the terms in the 'Employment Peace Act' are sufficiently definite and have been judicially defined many times. * * * The Act is sufficiently definite and certain in terminology which may be said to include 'well-understood concepts of the law,' (*Wisconsin Labor Relations Board v. Fred Rueping Leather Co.*, 228 Wis. 473 at 495)."

The State Supreme Court by a process of elimination definitely ruled out any general prohibition of peaceful picketing as described in the *Thornhill* case in the enforcement of Sec. 111.06 (2) (e) Wis. Stats. in the State of Wisconsin when it stated in its original opinion (S. R. 56):

> "The term 'picketing' as used in Subsection (2) (e) of Sec. 111.06 Stats., 1939, does not include acts held in the Thornhill case, supra, to be within the protection of the constitutional guaranty of the right of free speech.

> The express language of the Act forbids such a construction. It clearly refers to that kind of picketing which the Thornhill case says the state has the power to deal with 'as a part of its power to preserve the peace, and protect the privacy, the lives and the property of its residents.'"

This language was repeated almost verbatim in the final opinion of the State Supreme Court denying the motion for rehearing (S. R. 70-71).

By way of verbal legerdemain the petitioners seek to inject into the record of this case contempt proceedings that are now pending before the Milwaukee Circuit Court. In support thereof they again inaccurately allege facts that are not of record (Brief pp. 29, 36). Our aaswer is that the record in the pending contempt proceedings is separate and distinct from the record in the case at bar; it forms no part of these proceedings for it has not been introduced in evidence as part of this record; it concerns acts committed by the petitioners subsequent to the decisions of the Milwaukee Circuit Court and the State Supreme Court here under review. The conduct for which the petitioners are being charged with contempt does not consist merely of peaceful picketing or the writing of letters to prospective customers not to patronize the hotel as alleged by the petitioners (Brief pp. 29, 36). The bases of the contempt charge consist of manifestations of force, mass picketing enmeshed with unlawful boycotting and unfair advertising resulting in continuing fear and fraud to the employer, his working employees and the public generally. This Honorable Court will not anticipate by presumption that the Milwaukee Circuit Court will so construe the Labor Board's order confirmed by the state courts' decisions so as to put it to an abnormal use by way of enforcement or make an unlawful invasion upon free speech guaranteed by the Constitution. No application

has been made by the unions herein to modify or vacate the orders of the Wisconsin Labor Board and the judgments of the Supreme Court on the ground that the continuing intimidation or coercive effect of their past violence has disappeared. Therefore, the language of this Court in *Milk Wagon Drivers Union, et al. v. Meadowmoor Dairies, Inc.*, 312 U. S. ....., 61 Sup. Ct. 552, is highly pertinent and fully applicable to the record in the case at bar, to-wit:

> "Since the Union did not urge that the coercive effect had disappeared either before us or, apparently, before the state court, that question is not now here."

Lastly, it is claimed by the petitioners (pp. 35 and 36 Brief) that the order of the Board confirmed by the judgments of the Wisconsin courts is more comprehensive than necessary or proper under the doctrine of this court in the *Meadowmoor case*, supra. This claim is based upon the fact that the violence in the case at bar was not as extreme as that appearing in the Meadowmoor case. It suffices to say that the Wisconsin Labor Board, the Milwaukee Circuit Court and the Wisconsin State Supreme Court passed upon this question of fact and that the numerous unprovoked and most reprehensible assaults and batteries in the case at bar were sufficient to warrant the issuance of the Cease and Desist Order now under review. The conduct enjoined was the—

> "(a) Engaging in promoting or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;
>
> "(b) Attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employees of the Plankinton House Company;
>
> "(c) Boycotting in any way the Plankinton House Company."

It is submitted that this order is no broader than the injunc-

tion issued by the Illinois Supreme Court in the Meadowmoor case and confirmed by this Court when it stated (61 Sup. Ct. 552 at 557):

> "The injunction is confined to conduct near stores dealing in respondent's milk and it deals with this narrow area precisely because the coercive conduct affected it. An injunction so adjusted to a particular situation is in accord with the settled practice of equity, sanctioned by such guardians of civil liberties as Mr. Justice Cardozo. (Cf. *Nann v. Raimist*, 255 N. Y. 307, 174 N. E. 690, 73 A. L. R. 669). Such an injunction must be read in the context of its circumstances. Nor ought state action be held unconstitutional by interpreting the law of the state as though, to use a phrase of Mr. Justice Holmes, one were fired with a zeal to pervert."

If the continuing fear and intimidation generated by the past violence and misconduct of the petitioners has ceased, not only familiar equity procedure accords them the opportunity for modifying or vacating the order of the Board and the judgments of the state court, but express provisions of the Wisconsin Employment Peace Act assures the petitioners this right to relief. Thus, Sec. 111.07 (1) Wis. Stats. provides:

> "Any controversy concerning unfair labor practises may be submitted to the Board in the manner and with the effect provided in this chapter, *but nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction.*" (Italics ours.)

The Wisconsin courts, therefore, were always open to give the petitioners the appropriate equitable relief as and when they were entitled to it. There was no basis upon which the state courts could reasonably anticipate that the fear and intimidation generated by the past violence and unlawful conduct would immediately cease upon the rendition of their judgments. On the contrary the trial court found (R. 20 and 21):

"The Board was justified in concluding that the violent methods, assaults or disturbances which were pursued or which ensued from the outset and from time to time thereafter were ample to characterize the whole campaign or to warrant a reasonable inference that the attitude of the picketers was *continuously threatening or that threatening conduct would be resorted to should conditions be favorable for the purpose.*" (Italics ours.)

This prophetic foresight of the Milwaukee Circuit Court was fully justified by the subsequent events. As heretofore stated, the petitioners made no application to modify or vacate the Order of the Board as confirmed by the courts but continued in their unlawful conduct. As a result, as late as March 21, 1941, the Attorney General for the State of Wisconsin was forced to institute contempt proceedings against them to prevent their continuous manifestations of force, fear, unfair advertising and realistic picketing enmeshed with illegal boycott and picketing en masse.

CONCLUSION

It is submitted that the Petition for Writ of Certiorari should be denied because the record herein shows:

(1) Undisputed evidence of past violence and continuing fear and intimidation;

(2) The non-existence of a substantial federal question;

(3) The Decisions of the Wisconsin Supreme Court so construe Sec. 111.06 (2) (e) Wis. Stats. as not to invade the right to strike or the right to free speech; the Statute so construed is unquestionably constitutional.

Respectfully submitted,

HERMAN M. KNOELLER,
Attorney for
Plankinton House Company,
Respondent.